IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

TUESDAY, THE 12TH JUNE 2007 / 22ND JYAISHTA 1929

SA.No. 583 of 1993()

(AGAINST THE JUDGMENT AND DECREE IN AS.40/1990 DATED 30TH JUNE '92 of PRINCIPAL SUB COURT,KOCHI IN OS.778/1986 of PRL.M.C., KOCHI DATED 22/12/1989)

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APPELLANTS:RESPONDENTS:DEFENDANTS:

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1. ANTONY, THEKKEVEETTIL,
HOUSE NO.8/26, ELAMKUNNAPUZHA PANCHAYAT,
OCHANTHURUTHU P.O., COCHIN TALUK.

2. JOSE KONNATH,
HOUSE NO.8/27, ...DO.....DO.....

3. SOURI KONNATH,
HOUSE NO.8/28, ...DO.....DO.....

BY ADV. SRI.K.R KURUP,
SRI.C.R.SYAM KUMAR

RESPONDENTS: APPELLANT:PLAINTIFF:

ELIZABETH, D/O.ANTHE KALAPPURAKKAL,
EDACOCHIN DESOM, EDACOCHIN VILLAGE,
REP. BY JOHN J. KANDATHIL, ADVOCATE,
ERNAKULAM, COCHIN – 18. (D I E D)-*LRs IMPLEADED:

R2. MRS. VALSA THOMAS, D/O.LATE ELIZABATH,
RESIDING AT VALLANATT HOUSE, PUTHIYA ROAD,
KALOOR, KOCHI.

...2/-

R3. MRS. JESSY JOSE, D/O.LATE ELIZABATH,
RESIDING AT VALLANATT HOUSE, PUTHIYA ROAD,
KALOOR, KOCHI.

R4. MR.JOHN, S/O.LATE ELIZABATH, RESIDING AT VALLANATT HOUSE,
PUTHIYA ROAD, KALOOR, KOCHI.

(*ADDL.RESPONDENTS 2 TO 4 ARE IMPLEADED AS THE
LRS OF DECEASED SOLE REPONDENT AS PER ORDER
DTD. 24/05/2007 IN I.A.NO.2042/06.)

BY ADV. SRI.GEORGE CHERIAN for R1
SRI.BABU CHERUKARA

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD
ON 12/06/2007, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

J U D G M E N T

No representation for appellants today also. Appellants called. Absent. Appeal is dismissed for default.

12th June, 07 **Sd/-M.Sasidharan Nambiar, Judge**

SA.NO.583/1993

ORDER ON C.M.P.NO.1409/1993 IN S.A.NO.583/1993

DISMISSED

12/06/2007 SD/-M.SASIDHARAN NAMBIAR,JUDGE

/TRUE COPY/

P.S TO JUDGE

M.SASIDHARAN NAMBIAR, J.

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S.A.No. 583 OF 1993

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DATED THIS THE 17TH DAY OF JULY, 2007

JUDGMENT

Defendants in O.S.778 of 1986 on the file of Additional Munsiff Court, Kochi are the appellants. Respondent is the plaintiff. The suit was instituted seeking a decree for recovery of possession of plaint B, C and D schedule buildings in plaint A schedule property. Plaint B schedule is the building bearing Door No.8/26, plaint C schedule is the building bearing Door No.8/27(by mistake in the plaint it is also shown as 8/26) and plaint D schedule is the building bearing Door No.8/28. Plaint A schedule property originally belonged to Vallantt Mathai Ouseph. It was mortgaged in favour of Kalappurakkal Ouseph Anthey. The mortgagee instituted O.S.94 of 1106 and in execution of the decree the property was purchased by him as decree holder/auction purchaser. Subsequently under Ext.A3 sale deed, it was assigned in favour of Elizabeth, the respondent. Elizabeth became mentally ill and O.P. 2 of 1963 was filed before District Court, Ernakulam. Her brother Albert who was examined as PW1 was appointed as interim receiver. He managed the property till 4.8.1970. Thereafter he was removed

and A.T.John, the only son of Elizabeth was appointed as receiver. He was removed for maladministration as per order dated 22.12.1983 by District Court and Advocate John.J.Kandathil was appointed as Receiver to manage the property. It was the said Advocate Receiver who instituted the present suit for Elizabeth seeking a decree for recovery of possession of plaint B to D schedule buildings. As per the plaint allegation, when Advocate Receiver inspected the property, he noticed encroachments on the property and after obtaining orders from the court the property was measured and it was then found that plaint A schedule property in Survey No.1247/2 and 1248/1 were renumbered as Survey No.1410/2 and 1411/1 and were classified as puramboke land. The Receiver sent a notice to the government under Section 80 of Code of Civil Procedure for a declaration of title of Elizabeth to the plaint schedule property and also against the classification of the land as puramboke land. Seeking a decree for injunction restraining government from assigning the property in favour of the appellants, pursuant to that notice, O.S.774/1986 was filed by the Receiver before Munsiff Court, Kochi. On the contention of the 3rd respondent that plaint schedule property is in the possession of the

appellants herein and they have filed an application for assignment of the land and the suit is bad for their non joinder, they were impleaded as additional defendants. Appellants herein filed a written statement contending that they have perfected their title by adverse possession. They contended that plaint schedule property was taken away by sea and they later filled up and constructed the buildings and are residing therein and are in possession of the property and even if respondent has title to the property, it is barred by adverse possession. Under Ext.A4 judgment rejecting the case of the appellants that the property was taken away by sea and they filled up the land and constructed the building, learned Munsiff upheld the title of the respondent and granted a decree declaring the title. The question of adverse possession set up by the appellants were not decided as by that time, the present suit was instituted seeking a decree for recovery of possession and appellants had raised a plea of adverse possession in the suit. Under Ext.A4 judgment learned Munsiff held that the question of adverse possession has to be decided not in that suit but in O.S.778 of 1986. Respondent contended that only in 1975, appellants constructed the plaint B to D schedule with the connivance of

Kudikidappukars and therefore respondent is entitled to recover possession of the same. Appellants disputed the title and contended that they have been in possession of the property and title of the respondent if any is barred by adverse possession and limitation and therefore respondent is not entitled to the decree sought for.

2. Learned Munsiff on the evidence of PW1, Dws 1 to 8, Exts.A1 to A13 and Exts.B1 to B16, dismissed the suit holding that title of the respondent is barred by adverse possession. Learned Munsiff also found that even though recovery of possession of the buildings was sought, and even though appellants contended that they are in possession of the property, no decree for recovery of possession of the land was sought and therefore respondent is not entitled to the decree sought for. Respondent challenged the decree and judgment before Sub Court, Kochi in A.S.40 of 1990. Learned Sub Judge, on reappreciation of evidence, set aside the findings of learned Munsiff and held that under Ext.A4 judgment, title of the respondent has already been upheld and appellants did not prove that the title was barred by adverse possession and limitation. A decree for recovery of possession of plaint B to D

schedule buildings were granted. It is challenged in the second appeal.

3. The second appeal was admitted formulating the following substantial questions of law:-

1) When the possession of appellants beyond the period of 12 years is established, whether first appellate court was justified in granting a decree for recovery of possession.

2) Whether a defendant while pleading adverse possession, is precluded from taking alternative plea on bonafide belief and if so whether the decree granted by first appellate court is sustainable.

4. Learned counsel appearing for the appellants and respondents were heard.

5. Though appellants had disputed the title of respondent and had raised a contention that plaint schedule property was actually taken away by the sea earlier, and they filled up and created the plaint B to D schedule property, in the light of Ext.A4 judgment, where appellants were also parties, they cannot raise a contention disputing the title. Though an appeal was filed challenging Ext.A4 judgment, it was dismissed. Ext.A4 judgment title of respondent under Ext.A3 assignment deed executed by

Kalappurakkal Ouseph Anthey who obtained the property as per the court auction sale, was upheld. Therefore the finding of first appellate court that respondent has title to plaint schedule property cannot be challenged by appellants.

6. The only question is whether title of respondent is barred by adverse possession. The burden could only be on the appellants to prove that they have been in possession of the property for the requisite period and that too with the animus to possess it against the true owner.

7. Learned Munsiff after elaborately analysing the evidence, found that case of respondent that appellants constructed the building after trespassing therein in 1975 is not correct. Learned Munsiff relied on Ext.B1, B8 and B10 extracts of the demand register maintained by the panchayat. Learned Munsiff also found that in Ext.A4 suit itself appellants contended that they are in possession of the property also and no recovery of possession of the property was sought and the only decree sought for was recovery of possession of the buildings and as appellants are in possession of the property also the decree cannot be granted. Learned Munsiff upheld the plea of adverse possession raised by appellants and dismissed the suit. First

appellate court reappreciated the evidence. Definitely first appellate court has got the jurisdiction and the duty to reappreciate the evidence as it is the final fact finding authority. Learned Sub Judge analysing the evidence found that appellants did not establish their title by adverse possession. Learned Sub Judge found that according to appellants, plaint schedule property is a puramboke land belonging to the Government and therefore they can perfect the title by adverse possession if only they establish their possession for 30 years as against Government and as they have no case that plaint schedule property belonged to the respondent, they have not perfected title by adverse possession. Learned Sub Judge also found that Exts.B1, B8 and B10 do not establish that they have been in possession of the property for the requisite period as there is no evidence to prove that they are in possession of the plaint schedule property. Learned Sub Judge did not consider the question whether respondent is entitled to get a decree for recovery of possession of the building alone, even though the trial court found that appellants are in possession of the property also.

8. Learned counsel appearing for appellants relying on

the decision of this court in **Raman V. S.Devadasa Maller** (1991(1) KLJ 377), **Sarala V. Little Flower Mission**(2004(1) KLT 46 Short note case No.58, Page 46) and **Padmanabha Pillai Ayyappan Pillai V. Velayudhan Pillai Sivaraman Pillai** (1956 KLT 570) argued that possession of appellants was not disturbed by Ext.A4 decree for declaration and as the evidence would establish that from 1963 onwards they are residing in the property and as respondent has no case that that possession was permissive and instead the case in the plaint itself was that they are in unlawful possession of the property and in the circumstances of the case their possession can only be adverse to respondent and therefore first appellate court should not have interfered with the factual finding of trial court. It was further argued that evidence would establish that from 1963 onwards, appellants have been in possession of the property including plaint B to D schedule buildings and that possession was open and hostile to the whole world including the respondent and therefore decree for recovery of possession is not sustainable.

9. Learned counsel appearing for respondent relying on the decision of the ApexCourt in **Deva V. Sajjan Kumar**(AIR 2003

SC 3907) argued that as appellants are not recognising the right of respondent they cannot perfect their title by adverse possession as against respondent. It was also argued that mere long possession of the property by appellants even if it is beyond the period of 12 years, will not enable them to claim title by adverse possession and the period of 12 years has to be computed only from the date from which they recognised the right of respondent and therefore the decree granted by first appellate court is perfectly correct and warrants no interference.

10. For the reason that appellants have set up title on the Government or did not admit the title of respondent, by itself, it cannot be said that appellants are not entitled to raise a plea of adverse possession. As far as defendant is concerned, defendant is entitled to raise even contradictory pleas. Therefore for the reason that appellants did not admit the title it cannot be said that they are not entitled to raise a plea of adverse possession and limitation.

11. As rightly pointed out by learned counsel appearing for appellants what was contended in the plaint itself was that appellants trespassed into the plaint schedule property and constructed plaint B, C and D schedule buildings. There was no

case that they constructed the building or are residing there as permitted by respondent or the Receiver who was managing the property as appointed by the court. Therefore possession of appellants could only be adverse to the real owner.

12. The Advocate Receiver appointed by the court, instituted O.S.774 of 1986 just before the institution of the present suit seeking a declaration of title as against the government. In that suit Government raised a contention that plaint schedule properties are in the possession of appellants herein and the suit is bad for nonjoinder as they have applied to the Government for assignment of the land. Appellants were thereafter impleaded as defendants 4 to 6 in that suit. They raised a contention that they are in possession of the property. A Commissioner was appointed and the original or Ext.B5 report was submitted by the Commissioner in that suit which establishes that when the Commissioner inspected the property appellants were found in possession of not only plaint B to D schedule buildings but the property also. To the knowledge of respondent, appellants have raised a contention that they are in possession of the property. Therefore it is clear that they are in possession of the property with the necessary animus to possess

it against everybody else including the respondent and thereby title of respondent has been lost. Still respondent did not seek a decree for recovery of possession of the property and continued with the suit where a decree for recovery of possession of the building alone was claimed. Learned Munsiff appreciating this fact held that respondent is not entitled to a decree for recovery of possession of the building when a decree for recovery of possession of the land was not sought. As per the plaint, recovery of possession is sought in respect of only the land occupied by the building contending that buildings were unlawfully constructed after trespass. If that be the case, without seeking a decree for recovery of possession of the property, respondent is not entitled to a decree for recovery of possession of the property from the possession of appellants. Unfortunately, this aspect was lost sight of by first appellate court.

13. Learned Munsiff elaborately analysed the evidence and found that possession of plaint B to D schedule buildings was not from 1975 as claimed by appellants but at least from 1963 onwards. First appellate court did not agree with that findings and held that appellants did not establish their possession prior

to 1975. Though Exts.B1, B8 and B10 were accepted by the trial court to uphold the case of appellants regarding possession prior to 1975, first appellate court, analysing the same evidence found that there is no evidence to prove that they relate to plaint B to D schedule building. As rightly pointed by learned counsel appearing for appellants, first appellate court grossly erred in that finding as the evidence was not properly appreciated. Ext.B1 is the building tax demand register extract maintained by the panchayat in respect of the present building No.8/26. The fact that plaint B schedule building is building No.8/26 cannot be disputed as that is the very case set up in the plaint. If Ext.B1 series of the extracts of the building tax demand register is verified, it could be seen that it relates to the plaint schedule property as the previous(old) number of the building No.8/28 is shown in each of the extracts and therefore it cannot be disputed that it relates to plaint B schedule building. Similarly Ext.B10 shows that it relates to plaint D schedule property as the present building number and corresponding old numbers tallies with respect to plaint D schedule building. As regards Ext.B8 extract, it is seen that the old building number in Ext.B8 is not correctly shown. Learned counsel apearing for appellants had shown the

photocopy of the certified copy of the building tax register which shows that old number shown in the extract for the year 1983-84 was not correctly shown. Moreover the only oral evidence tendered by respondent is that of PW1, the brother of Elizabeth, who was the first Receiver appointed by the District Court. The evidence of PW1 is that buildings were constructed in 1967 - 1968. If that be so, the fact that the buildings were in existence at least from 1967-68 cannot be disputed by the respondent. The question is whether possession of appellants since then could be adverse to respondent. As long as respondent has no case that possession of appelants at any point of time was permissive and in the light of the specific case of respondent in the plaint that they trespassed and constructed the building in their possession, could only be adverse to respondent. If that be so, the finding of first appellate court that the appellants did not establish that they have been in possession of the buildings for the requisite period and that too with the animus to possess it against respondent is not correct. The evidence establish that appellants have been in possession of the property at least from 1967 onwards and it was with an animus to possess it against the whole world including the respondent. Therefore the finding of

first appellate court that appellants have not perfected the title is not sustainable. On the evidence, first appellate court should not have interfered with the finding of trial court.

The appeal is allowed. Decree and judgment granted by first appellate court is set aside and that of trial court is restored.

M.SASIDHARAN NAMBIAR, JUDGE

lgk/-